No. 86-80 (1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

JOSEPH BURGER,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

The statutory scheme at issue in this case is identical in all relevant respects to the federal statute upheld by this Court in *United States v. Biswell*, 406 U.S. 311 (1972). The efforts of defendant and *amicus curiae* ACLU to find a distinction rest on a series of mistakes, set forth below, concerning both the *Biswell* statute that regulates licensed dealers in firearms, and the New York statute that regulates licensed vehicle dismantlers. If this Court were to uphold the distinction, it would in effect be holding that only Congress, and not the states, may constitutionally authorize warrantless inspections of a regulated industry. That simply cannot be the law.

1. The Treasury agents who conduct inspections under the federal Gun Control Act, like the police officers who conduct inspections under New York's VTL, are authorized to carry firearms and to make arrests for any federal crimes, and not merely crimes related to the regulatory scheme they enforce. 27 C.F.R. § 70.28.[1] The suggestion that the Constitution permits inspections by Treasury agents but not by police officers (Resp. Br. at 16-17, *Amicus* Br. at 39) elevates form over substance.[2] The fourth amendment provides no reason to distinguish between inspections conducted by specialized agents and those conducted by police officers. Moreover, because federal law enforcement is conducted by a number of specialized law enforcement agencies, whereas state and local law enforcement is more commonly conducted by nonspecialized police forces, the principal effect of the distinction would be to strike down state regulatory statutes while upholding similar federal statutes. The Constitution does not require that result.

2. The business of selling firearms is no more complex, dangerous, or otherwise suitable for regulation than the business of dismantling vehicles or selling secondhand goods. *Amicus* ACLU suggests that administrative regulation of vehicle dismantlers is inappropriate because, unlike gun and liquor dealers and industries governed by safety codes, vehicle dismantlers do not present issues involving the unique economic and social conditions of the modern state, or modern urban and technological conditions (*Amicus* Br. at 28). They are wrong on two counts.

First, the Constitution does not distinguish between regulation of industries dominated by modern technology and other industries. *Donovan v. Dewey*, 452 U.S. 594, 605-06 (1981).

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1 Likewise the Internal Revenue agents who conducted inspections under the liquor laws at issue in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), were authorized to carry firearms and to make arrests. 26 U.S.C. § 7608(a).

2 Indeed, the distinction collapses on the facts of *Biswell*, where the federal agent was accompanied by a city police officer. 406 U.S. at 312.

Second, vehicle dismantlers in fact present not simply the age-old problem of theft, but a problem peculiar to modern technology and the economic conditions of the modern state. Motor vehicles, after all, are the lifeblood of the modern state, and the problem of tracing stolen cars is peculiarly difficult for reasons relating to modern technology: because motor vehicles are made from standardized parts, it is profitable to dismantle a stolen car and resell its parts to a multitude of different buyers. The vehicle dismantling industry, which is a product of modern technology and the modern state, is uniquely capable of facilitating the traffic in stolen cars. Vehicle dismantlers, like the firearms dealers regulated in *Biswell*, are regulated and inspected in order to prevent the industry from promoting crime.

Just as Congress reasonably sought to prevent violent crime by regulating the businesses that sell firearms, so New York reasonably seeks to prevent motor vehicle theft by regulating the businesses that dismantle vehicles and sell their parts. *See* W. LaFave & A. Scott, Jr., *Criminal Law* § 8.10, at 765 (2d ed. 1986) (without professional receivers of stolen property, "theft ceases to be profitable"); 2 *Encyclopedia of Crime and Justice* 789 (S. Kadish ed. 1983) (existence of receivers of stolen property "inspires 95 percent or more of the theft in America"); 4 *id.* 1550 (one approach to problem of professional receiver of stolen goods is "to license and regulate pawnshops, junk dealers, and secondhand stores"); Blakey & Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 Mich. L. Rev. 1511, 1512 (1976) (development of sophisticated fencing systems "has paralleled the industrialization of society").

Indeed, this Court recently dismissed a fourth amendment challenge to a Colorado statute imposing a similar regulatory scheme on dealers in coins and precious and semiprecious stones and metals. *Exotic Coins, Inc. v. Beacom*, 106 S. Ct. 214 (1985), *dismissing for want of a substantial federal question appeal from* 699 P.2d 930 (Colo. 1985). That statute, like the statutes at issue here, required dealers to record their

inventory and authorized warrantless inspections of both records and inventory. That statute, like the statutes here, sought to deter the traffic in stolen valuable property by regulating the dealers.

3. Defendant and *amicus* ACLU suggest that New York's regulations are not voluminous enough to qualify as a genuine administrative inspection scheme (Resp. Br. at 14 n.3, *Amicus* Br. at 32-39), but surely the constitutional validity of an administrative scheme is not measured by the number of regulations it generates. Ten pages of regulations are adequate to specify the form and content of the records required to be kept by vehicle dismantlers. The regulations prescribe that records must be kept in a permanently bound book, and that inventory must be recorded chronologically and in a form that precludes subsequent alteration. *See* N.Y. Comp. Codes R. & Regs. tit. 15, Part 81. These regulations are well suited to the purpose of preventing vehicle dismantlers from dealing in prohibited inventory.

Similarly, *amicus* ACLU suggests that because New York does not prescribe numerous qualifications for a vehicle dismantler's license, the licensing requirement is "more a formality than a serious regulatory effort" (*Amicus* Br. at 32-33). To the contrary, the licensing requirement is no less genuine because its principal concern is to screen out of the industry persons who have been convicted of crimes and are likely to use a vehicle dismantling business to dispose of stolen property. The regulations are adequate to accomplish their wholly legitimate purpose.

4. The administrative scheme in *Biswell*, like the one at issue here, regulated both inventory and recordkeeping, and authorized inspections to insure compliance with both aspects of the law. *Amicus* ACLU suggests that *Biswell* did not approve any inspection of inventory after the officers determined that the defendant was in violation of the recordkeeping requirements (*Amicus* Br. at 37-38), but they are mistaken. In *Biswell*, after

the agent had determined that the defendant's records were inadequate under the statute, he proceeded to inspect the inventory, as he was authorized to do by statute, for evidence that the defendant was dealing in illegal weapons. 406 U.S. at 311-12. So too here, after the officers had determined that defendant had failed to maintain statutorily required records, they inspected his inventory for evidence that he was dealing in stolen vehicles or parts.

The suggestion that this amounts to a search "for evidence of further crimes unrelated to the regulated business" (*Amicus* Br. at 38) is simply absurd. Whether the regulated businessperson is a firearms dealer or vehicle dismantler, the question whether that business is dealing in prohibited inventory is central to the regulated business and not, as *amicus* suggests, unrelated to it.[3]

5. Defendant and *amicus curiae* attack three particular features of the statutes at issue here, but each of these features was present in the statute upheld by this Court in *Biswell*. First, they object that the statutes at issue here contain no explicit limitation on the frequency of inspection (Resp. Br. at 12, see also *Amicus* Br. at 49). No such limitation is found in the gun control statute upheld in *Biswell* or for that matter in the mine safety statute upheld in *Donovan v. Dewey*, 452 U.S. 594 (1981). Indeed, while *amicus curiae* points with approval to the mine safety statute as one which defines the frequency of inspection (*Amicus* Br. at 49), the statute does so by setting a minimum and not a maximum on the number of inspections to be conducted annually. *See* 452 U.S. at 604.

Second, they suggest that either an adminstrative warrant or some other forum for pre-inspection judicial review is constitutionally required (*Amicus* Br. at 44-51, see also Resp. Br. at

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3 Indeed, the crime for which the defendant in this case was convicted was not simply criminal possession of stolen property, but rather possession of stolen property by a person who "is a pawnbroker or is in the business of buying, selling or otherwise dealing in property." N.Y. Penal Law § 165.45(3) (McKinney 1975).

13). To the contrary, while constitutional concerns may be safeguarded by a warrant requirement, *See v. City of Seattle*, 387 U.S. 541 (1967), or by alternative forms of pre-inspection review, *Donovan v. Dewey*, 452 U.S. 594 (1981), this Court in *Biswell* and *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), approved inspection statutes with neither feature.

Third, *amicus* ACLU attempts to attack the constitutionality of the statutes on the ground that "the authorized response where permission to search is refused is search by the forcible compulsion of armed police officers" (*Amicus* Br. at 50). This attempt fails for two reasons.

First, neither VTL § 415-a nor Charter § 436 authorizes the use of force to carry out inspections. Instead, each statute merely authorizes the imposition of criminal penalties for refusal to permit an inspection. VTL § 415-a(5)(a) (class A misdemeanor); Charter § 436 (offense punishable by prison term of up to thirty days, or fine of up to fifty dollars, or both). As this Court held in *Colonnade Catering Corp. v. United States*, 397 U.S. at 77, absent an express provision authorizing the use of force, the criminal penalties are the exclusive sanction under the statutory scheme for refusing an inspection. In this case as in *Colonnade*, there is simply no ground to read into the statutory scheme any authority to compel an inspection through force. Therefore, VTL § 415-a and Charter § 436 cannot be found constitutionally defective based on the speculative possibility of forcible inspections that are not authorized by the statutes.

Second, defendant cannot challenge the statutes on the ground that they could conceivably be applied in an unconstitutional manner in some hypothetical situation not before the Court. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973). Rather, defendant's challenge must be strictly limited to the facts of this case, which do not involve a forcible entry. The police officers who conducted the inspection of defendant's junkyard did not use any force to carry out the inspection.

Indeed, defendant never objected to the inspection at all. Similarly, defendant cannot challenge the statutes on the ground that they might be abused in another case through an inspection conducted merely as a pretext for a search in furtherance of a criminal investigation (Resp. Br. at 18 n.5). The courts below have uniformly found that no such abuse occurred in this case. 67 N.Y.2d at 342-43, 493 N.E.2d at 928, 502 N.Y.S.2d at 704 (Pet. App., pp. 5a-6a); 112 A.D.2d 1046, 493 N.Y.S.2d at 35 (Pet. App., pp. 9a-10a); 125 Misc.2d at 714, 479 N.Y.S.2d at 940 (Pet. App., p. 16a).

6. The statutes at issue here, like those approved in *Biswell* and *Colonnade*, bear no resemblance whatever to the specter raised by defendant and *amicus* ACLU of a criminal statute authorizing "unannounced warrantless searches of property reasonably thought to house unlawful drug activity" (Resp. Br. at 15, 18-19, *Amicus* Br. at 25-26, 30, quoting *Donovan v. Dewey*, 452 U.S. 594, 608 (1981) (Rehnquist, J., concurring)). Such a statute would authorize searches of any homes or businesses, while the statutes at issue here cover only a well-defined class of pervasively regulated businesses, with a unique potential for facilitating the precise illegal activity that prompted the administrative scheme. Moreover, such a statute would authorize searches based on mere suspicion of crime rather than probable cause; the statutes at issue here, by contrast, prohibit searches based on either suspicion or probable cause, and require instead a routine inspection schedule whose subjects are selected without regard to any suspicion of crime.

While the legislature could not authorize warrantless inspections of all suspected drug locations by purporting to regulate the narcotics industry, it can and does attack the problem of illegal drug activity by regulating the pharmacy business. In *United States ex rel. Terraciano v. Montanye*, 493 F.2d 682 (2d Cir.), *cert. denied*, 419 U.S. 875 (1974), the Second Circuit upheld New York statutes that authorized warrantless inspections, at the premises of licensed pharmacists, of records relating to narcotics and to stimulant or depressant drugs. The

statutes applied only to a well-defined class of businesses that carried a unique potential for involvement in illegal drug activity, and the statutes authorized inspection of records only at the business premises. In addition, the pharmacy industry is "properly subject to intensive regulation in the public interest," *id.* at 685, so pharmacists have a reduced expectation of privacy in their business premises. *Terraciano* thus demonstrates that, through a properly-limited statute, the State may indeed constitutionally seek to prevent drug-related crime by means of a scheme of warrantless inspections.

CONCLUSION

The statutes in this case are indistinguishable from those upheld by this Court in *Biswell* and *Colonnade*, and satisfy well-established constitutional requirements. Defendant's efforts to draw a distinction are unsupported by either fact or reason. The New York Court of Appeals erroneously believed that this Court's precedents compelled it to invalidate the statutes. That judgment should be reversed.

Respectfully submitted,

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